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No. 91-453

In The

Supreme Court of the United States

October Term, 1991

DAVID H. LUCAS,

Petitioner,

v.

SOUTH CAROLINA COASTAL COUNCIL,

Respondent.

On Writ Of Certiorari To The
Supreme Court Of The State Of South Carolina

BRIEF FOR AMERICAN PLANNING ASSOCIATION AND TAHOE REGIONAL PLANNING AGENCY AS AMICI CURIAE IN SUPPORT OF RESPONDENT

GARY A. OWEN
CROWELL, SUSICH, OWEN
& TACKES, LTD.
510 W. Fourth Street
Post Office Box 1000
Carson City, Nevada 89702
(702) 882-1311

Of Counsel for Amicus Curiae Tahoe Regional Planning Agency

H. BISSELL CAREY, III*
ROBINSON & COLE
One Commercial Plaza
Hartford, Connecticut 06103
(203) 275-8200

Counsel for Amici Curiae American Planning Association and Tahoe Regional Planning Agency

*Counsel of Record

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

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INTERESTS OF THE AMERICAN PLANNING ASSOCIATION AND TAHOE REGIONAL PLANNING AGENCY

The American Planning Association ("APA") is a non-profit association of 27,000 members, all of whom are employed in the field of land use planning or are otherwise vitally concerned with the discipline.

Virtually all members of APA are engaged in land use planning either on behalf of governmental bodies exercising regulatory authority over the use of real property or for the benefit of holders of land subject to land use regulation. Consequently, APA does not represent the interests of those who seek to increase the constitutionally permissible scope of government regulation or promote the interests, constitutional or otherwise of individual landowners. APA and its members are fundamentally and vitally interested in the promotion of the rational, predictable, effective, and beneficial use of real property consistent with the needs of individuals having recognized interests in property and the public at large. APA members are the professionals who engage in the planning to accomplish that fundamental goal.

The Tahoe Regional Planning Agency ("TRPA") is an entity created by an interstate compact between the States of California and Nevada, approved by Congress. Tahoe Regional Planning Compact, Pub. L. 91-148, 83 Stat. 360 (1969), *amended* Pub. L. 96-551, 94 Stat. 3233 (1980). Its jurisdiction encompasses the Lake Tahoe Basin, an approximately 325 square-mile environmentally fragile air and water basin whose focal point is Lake Tahoe. TRPA is charged by the Compact with adopting and implementing a regional plan of resource conservation to stem the rather rapid deterioration of Lake Tahoe and its environs. The agency has adopted a plan implementing regulations, including the regulation of development near and around Lake Tahoe.

Land use planning alone, however, does not translate to rational, predictable, effective, and beneficial land use without enforceable regulations to implement the plans made to accomplish those purposes. Effective implementation of sound land use planning is threatened by Petitioner's suggestion that this Court adopt a

rule which, in essence, makes the "market value" of property *the* determinant factor in considering whether the application of an admittedly valid[1] land use regulation results in a "taking" under the Fifth Amendment. It is this suggestion, and its impact on land use planning, which causes APA and TRPA to file this brief as *amici curiae*.

APA and TRPA submit this brief as *amici curiae* pursuant to Supreme Court Rule 37.[2]

STATEMENT OF THE CASE

Respondent's Brief offers a concise, complete factual statement of the underlying dispute and procedural history leading to the grant of certiorari by this Court on November 18, 1991. Certain facts either of record or subject to judicial notice of this Court require emphasis for purposes of the arguments made herein.

First, South Carolina's 1988 Beachfront Management Act, 1988 Act No. 634, *codified* at S.C. Code Ann. § 48-39-250 *et seq.*, (the "Act"), the legislation giving rise to Petitioner's claim, was amended effective on June 25, 1990,[3] to provide a means by which a landowner, prevented by operation of the Act from constructing any structure on its property, may obtain a permit to do so. 1990 Act No. 607, s. 3

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[1] The parties hereto have so stipulated. *Lucas v. South Carolina Coastal Council*, ___ S.C. ___, 404 S.E.2d 895 (1991), *citing* Respondent's Brief to the South Carolina Supreme Court, p. 4.

[2] Written consent for the filing of this brief has been granted by counsel for all parties. Letters of consent have been filed with the Clerk of this Court.

[3] The bill which eventually became known as 1990 Act No. 607 was first introduced in the South Carolina legislature on February 16, 1989, less than a year after the 1988 Beachfront Management Act became effective. It was immediately referred to committee, and reported out favorably on April 25, 1989, but languished until a joint conference report of both houses adopted the measure on June 19, 1990. The 1990 amendment took effect upon signature of the governor on June 25, 1990.

codified at S.C. Code Ann. § 48-39-290(D) (1990 Supp.) (the "1990 amendments"). The record does not reveal whether Petitioner has submitted an application for a building permit under the Act as amended.[4]

Second, Petitioner purchased his two lots in 1986. Petitioner never obtained *any* permit to construct any structure on either of his lots. Transcript of Record from South Carolina Supreme Court ("Transcript"), pp. 39-40.

Last, many of "public harms" identified by the South Carolina legislature, the same harms so readily belittled as either insignificant[5] or secondary[6] to the purposes of the Act, became menacingly real with the onslaught of Hurricane Hugo in 1989. The impact of that storm, typical of hurricanes which affect the South Carolina seacoast regularly,[7] is one of public record, judicial notice of which is appropriate.[8]

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[4] Respondent has, however, indicated to Counsel of Record that Petitioner has, in fact, failed to apply for any such permit.

[5] Petitioner opines that "[i]t is readily apparent that the underlying purpose" of the Act was to promote tourism and the public use of South Carolina's beaches. Petitioner's Brief on the Merits, p. 39.

[6] The dissent to the decision below would have found, as a matter of law, that the "primary" purpose of the Act was not the prevention of a "nuisance." *Lucas v. South Carolina Coastal Council*, ___ S.C. ___, 404 S.E. 2d 895, 905 (1991).

[7] *See, e.g.*, Simpson, Robert R. and Herbert Riehl, *The Hurricane and Its Impact*, (1981).

[8] Fed. Rules of Evid. 201(b), 28 U.S.C. *See also Elwood v. City of New York*, 450 F. Supp. 846 (D.C.N.Y. 1978), *rev'd on other grounds*, 606 F.2d 358, *cert. denied*, 447 U.S. 906 (1980) (acknowledges the power of the Court to take judicial notice of scientifically verifiable facts); *American Indians Residing on Maricopa-Ak Chin Reservation v. United States*, 667 F.2d 980 (U.S.C.C. 1981), *cert. denied*, 456 U.S. 9089 (1982) (allows judicial notice of information in public records); *Fair Ocean Co., Ltd. v. Cargo or Permina Samudra XII*, 423 F. Supp. 1037 (D.C. Guam 1976) (permits judicial notice of tropical storm conditions.).

Estimated to have generated a storm surge of between 10 to 13 feet above normal,[9] Hurricane Hugo swept ashore during the Fall of 1989 inundating virtually all of the Isle of Palms. Despite the revetment running southerly from seaward of lot 23 (constructed to provide protection from the sea, and presumably providing the same for lots to the south of lot 23) and a nourishment project on the beach, (Joint Appendix, pp. 2-3), the residences on either side of Petitioner's lots, as well as structures immediately in back of these lots, were substantially damaged. During the first years after Hurricane Hugo, building permits were issued in the Isle of Palms for two-thirds of the buildings that existed before the store. One out of twenty were completely destroyed.[10]

SUMMARY OF ARGUMENT

It is not hyperbole to suggest that Petitioner invites the Court to render a decision in this matter which would, in the final analysis, cause a significant and essentially detrimental upheaval in the law of "regulating takings,"[11] one that would impede the government's ability to rationally plan and

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[9] BCD Council of Governments, *The Isle of Palms. Hurricane Hugo: One Year Later*, p. ii.

[10] *Id.*, pp. 10-11.

[11] Of substantial concern is the fact that this challenge is made in the context of a regulation which has as one of its many purposes the preservation of environmentally sensitive land in a condition which will permit it to perform its naturally *protective* role. It is unchallenged that the legislation would have promoted that worthy purpose. As pointed out *infra*, a vast panoply of state and federal jurisprudence has insulated regulation seeking to protect environmentally sensitive areas from development against "taking" claims, even where the impact on the "market value" of the property subject of the regulation has been significant.

regulate the use of property.[12] Petitioner urges the abandonment of the multi-faceted, *ad hoc* and admittedly difficult factual inquiry traditionally involved in Fifth Amendment "taking" jurisprudence in favor of a single, economically predicated, litmus test used to determine real estate entrepreneurial failure: no present "market value."[13]

As demonstrated below, the Court should reject Petitioner's impassioned plea to have this Court construe the Fifth Amendment to require constitutional preservation of the value of his assets by adopting a single, simplistic litmus test as to when the application of a land use regulation "goes too far."[14]

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[12] Even Justice Holmes, whose opinion is so frequently relied upon to support the economic use test for takings jurisprudence, forewarned that, "Government could hardly go on if to some extent values incident to property could not be diminished without paying for every such change in the general law. . . . some values are enjoyed under an implied limitation and must yield to the police power." *Pennsylvania Coal v. Mahon*, 260 U.S. 393, 413 (1922).

[13] Petitioner states his position as follows:

> . . . the enforcement of land-use regulations which have the effect of *eliminating the value of private property* should be *per se* subject to the just compensation requirement of the Fifth Amendment.

Petitioner's Brief on the Merits, p. 19 (emphasis provided).

It is clear from the trial record that Petitioner is referring to the "market value" of his property at the time the Act was first applied to his property, *i.e.* when the "baseline" and "setback" lines were established along the shoreline where his property is located. (Transcript, pp. 31-5, 48-9).

[14] *Pennsylvania Coal v. Mahon*, 260 U.S. 393 (1922). It is not surprising, in light of the competing constitutional and public policy concerns involved in the issue, that a "litmus test" to determine if a "taking" has occurred has managed to elude the United States Supreme Court. *E.g.*, *Penn Central Transportation Co. v. New York*, 438 U.S. 104, 123-4 (1977). It is surprising, however, that Petitioner views that the same constitutional and public policy tensions are now in some way resolved to permit the adoption of the singularly simple solution he suggests.

That is not to say that Petitioner's *property rights* do not or should not enjoy constitutional protection or that those same rights do not or should not enjoy that protection through judicial intervention. It is to say that one's property is not "taken" under the Fifth Amendment if the record reveals that there has been nothing more than a temporal impact on its value allegedly caused by application of a state regulation which is, by stipulation of the parties and according to that state's highest court, designed to prevent a recognized and serious public harm. This is particularly true, we urge, if the property owner has not availed himself of the opportunity to seek to regain all or most of the value allegedly lost, if the uses prohibited by the allegedly offending legislation, relied upon as the foundation of the property's "market value," do not enjoy constitutional protection, and if the property owner retains most if not all of the traditionally recognized "bundle of rights" in the property.

ARGUMENT

I. THE SOUTH CAROLINA SUPREME COURT'S RELIANCE ON THE RULE FIRST SET FORTH IN *MUGLER V. KANSAS*, 123 U.S. 623 (1887) TO PRECLUDE PETITIONER'S FIFTH AMENDMENT TAKING CLAIM WAS APPROPRIATE UNDER THE CIRCUMSTANCES OF THE CASE PRESENTED.

After what the Transcript reveals to have been a brief trial, the Court of common Pleas, Charleston County, South Carolina found that "[t]he effect of the setback line imposed by the beachfront Management Act on Lucas's two lots is to render property which was otherwise perfectly suitable for single-family residential development valueless."[15]

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[15] The trial court also found that "enforcement of the Beachfront Management Act has deprived Lucas of all of the essential elements of ownership." Pet. App., p. 39. This finding was made, presumably, on the strength of the conclusion that "essential elements of ownership" are defined as those having monetary or market value. It is respectfully suggested that the trial court's conclusion on this score is incorrect, at least as it applies to the Fifth Amendment. *See* Section III, *infra*.

Petitioner's Appendix to Petition for Certiorari ("Pet. App."). The trial court then concluded that the application of the Act to Petitioner's vacant lots resulted in a "taking" of that property under the Fifth Amendment of the United States Constitution.[16]

On appeal, the South Carolina Supreme Court held that the purposes of the Act were to prevent a recognized public harm, and because neither the validity of the Act nor the findings of the South Carolina legislature with respect to its purposes went unchallenged in the trial court, the rule set forth in *Mugler v. Kansas*, 123 U.S. 623 (1887) and its progeny should apply. It therefore reversed the decision of the lower court. *Lucas v. South Carolina Coastal Council*, ___ S.C. ___, 404 S.E.2d 895 (S.C. 1991), *cert. granted*, ___ U.S. ___, 112 S.Ct. 436 (1991). Petitioner sought, and was granted, a writ of certiorari. This appeal, therefore, contests the validity of the South Carolina Supreme Court's application of what it dubbed as the "*Mugler* rule" to Petitioner's claim.

As noted by the South Carolina Supreme Court, this Court's decision in *Keystone Bituminous Coal Ass'n v. DeBenedictis*, 480 U.S. 470 (1987) put to rest any remaining notion that *Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393 (1922) had, in essence, eviscerated the essential holding of *Mugler v. Kansas*, 123 U.S. 623 (1887). *Lucas v. South Carolina Coastal Council*, ___ S.C. ___, 404 S.E.2d 895 (S.C. 1991), *cert. granted*, ___ U.S. ___, 112 S.Ct. 436 (1991). *Keystone* not only affirmed the viability of *Mugler* and its progeny but also by virtue of its reliance on the application of the rule set forth in those cases sought to explain and define the rule itself. *Keystone Bituminous Coal Ass'n v. DeBenedictis, supra*, 480 U.S. at 488-492.

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[16] The Circuit Court ordered the payment of compensation for the lots as a result of its finding and, upon payment, the transfer of title to the State of South Carolina. No alternative remedy was ordered. Pet. App., pp. 40-41. *See* Section III, *infra*, pp. 21-29.

Ironically, this Court began its analysis with the teachings of the same decision which purportedly cast doubt on the viability of *Mugler* and other similar cases:

> In *Pennsylvania Coal* the Court recognized that the nature of the State's interest in the regulation is a critical factor in determining whether a taking has occurred, and thus whether compensation is required. . . .
>
> * * *
>
> Many cases before and since *Pennsylvania Coal* have recognized that the *nature* of the State's action is critical in takings analysis.

Id., 480 U.S. at 488 (emphasis supplied).[17] The *Keystone* dissent agreed, emphasizing that the "nature" of the regulation "may be relevant, for we have recognized that a taking does not occur where the government exercises its unquestioned authority to prevent a property owner from using his property to injure others *without having to compensate the value of the forbidden use*." *Id.*, 480 U.S. at 511 (emphasis supplied, citations omitted). After quoting at length from Justice Harlan's opinion in *Mugler v. Kansas* and referring with favor to other precedent supporting the conclusion that the nature of the State's action is a predominant factor in the required " . . . weighing of private and public interests", *Id.*, 480 U.S. at 492, the Court held:

> The Court's hesitance to find a taking when the State merely restrains uses of property that are tantamount to public nuisances is consistent with the notion of "reciprocity of advantage" that Justice Holmes referred to in *Pennsylvania Coal* . . . While

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[17] The Court also pointed out that

> . . . the type of taking alleged is also an often critical factor. . . .While the Court has almost invariably found that the permanent physical occupation of property constitutes a taking, (citation omitted) the Court has repeatedly upheld regulations that destroy or adversely affect real property interests (citations omitted).

Id., 480 U.S. at 488-9, n. 18.

> each of us is burdened somewhat by [land use regulations], we, in turn, benefit greatly from the restrictions that are placed on others (citation omitted). Long ago it was recognized that "all property in this county is held under the implied obligation that the *owner's use of it shall not be injurious to the community*," (citations omitted) and the Takings Clause did not transform that principle to one that requires compensation whenever the state asserts its power to enforce it.

Id., 480 U.S. at 491-2 (emphasis supplied). As a result, the Court explained, "the public interest in preventing activities similar to public nuisances is a substantial one, which in many instances has not required compensation . . . " and then held that the regulation at issue in *Keystone* " . . . plainly seeks to further such an interest." *Id.*, 480 U.S. at 492.

Petitioner argues that the "*Mugler* rule" should be narrowly construed and, if so construed, that the Act at issue here would not fall within the so-called "nuisance exception."[18] It is therefore appropriate, and possibly determinative, to examine certain aspects of the rule which are pertinent to the inquiry presently before the Court.

Clearly, the rule has been applied to uphold the regulation of uses other than those which are found to be "nuisances *per se*." Comparing the facts in *Reinman v. Little Rock*, 237 U.S. 171 (1915), to the case before it, the Court in *Hadacheck v. Sebastian*, 239 U.S. 394 (1915) stated that

> . . . [t]here was a prohibition of a business, lawful in itself, there as here. It was a livery stable there; a brick yard here. They differ in particulars, but they are alike in that which cause and justify prohibition in defined localities – that is, the effect upon the health and comfort of the community. . . . This court said of [the ordinance at issue in *Reinman*]: "granting that the business was not a nuisance per se, it was clearly within the police power of the State to regulate it," and to that end to declare that

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[18] This phrase was apparently coined by the dissent in *Penn Central Transportation Co. v. New York City*, 438 U.S. at 145.

> in particular circumstances and in particular localities a livery stable shall be deemed a nuisance in fact and in law."

Hadacheck v. Sebastian, 239 U.S. at 410-411, quoting *Reinman v. Little Rock*, 237 U.S. at 171. This same principle has been more graphically expressed as follows:

> Thus the question whether the power exists to forbid the erection of a building of a particular kind or for a particular use, like the question of whether a particular thing is a nuisance, is to be determined, not by the abstract consideration of the building or of the thing considered apart, but *by considering it in connection with the circumstances and the locality*. (Citation omitted). *A nuisance may be merely a right thing in the wrong place,-like a pig in the parlor instead of the barnyard.*

Euclid v. Ambler Realty Co., 272 U.S. 365, 388 (1926) (emphasis provided).[19]

The Court need not engage in consideration of whether the use prohibited by a challenged regulation " . . . constitute(s) a nuisance according to common law; or whether they may be so declared by state." *Keystone Bituminous Coal Ass'n v. DeBenedictis, supra*, 480 U.S. at 490. Rather, if it is "clear that the exercise of [the] police power to prevent [an] impending danger is justified," then the prohibition of that use does "not require compensation." *Id.*

This is hardly a novel concept in the jurisprudence of this Court; it enjoys the support and endorsement of the great

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[19] Numerous state decisions follow the original *Mugler* rationale that some potentially harmful activities are simply unreasonable uses of land and to deny them does not deny the reasonable use of land – it merely requires the landowner to act reasonably. *See, e.g., Spiegle v. Borough of Beach Haven*, 46 N.J. Super. 479, 491-92, 218 A.2d 129, 137 (1966), *cert. denied*, 385 U.S. 831 (1966). *See also* Norman Williams, Jr., *American Land Planning Law: Land Use and the Police Power* (1974-75) and Rohan, *Zoning and Land Use Controls* § 18.04[3][ii] (1991). For the Court now to alter this century-long precedent in the state cases would wreak havoc in the 50 states that have relied on it in creating and administering their land use systems.

weight of this century's Supreme Court precedent. As held in *Penn Central Transportation Co. v. New York City*, 438 U.S. 104 (1977):

> [M]ore importantly for the present case, in instances in which a state tribunal reasonably concluded that "the health, safety, morals, or general welfare" would be promoted by prohibiting particular contemplated uses of land, this Court has upheld land-use regulations that *destroyed* or adversely affected *recognized real property interests*. *See Nectow v. Cambridge*, 277 U.S. 183, 188 (1928) Zoning laws are, of course, the classic example (citations omitted) which have been viewed as permissible governmental action even when prohibiting the most beneficial use of the property (citations omitted).

Id., 438 U.S. at 125.

Lastly, the use prohibited need not be "noxious." As explained by this Court in *Penn Central*:

> We observe that the uses in issue in *Hadacheck*, *Miller* [*v. Schoene*, 276 U.S. 272 (1928)], and *Goldblatt* [*v. Hempstead*, 369 U.S. 590 (1962)] were perfectly lawful in themselves. They involved no "blameworthiness, . . . moral wrongdoing or conscious act of dangerous risk taking which induce[d society] to shift the cost to a pa[rt]icular individual." (Citation omitted). These cases are better understood as resting not on any supposed "noxious" quality of the prohibited uses but rather on the ground that the restrictions were reasonably related to the implementation of a policy – not unlike historic preservation – expected to produce a widespread public benefit and applicable to all similarly situated property.

Id. 438 U.S. at 133-4, n. 30.

Not surprisingly, and of particular significance to this appeal, land use regulations regarding shoreline construction, on the strength of the public purposes of either the preservation of the environment or the prevention of harm from

environmental forces, have been upheld against taking challenges, even when the effect of the regulation is the destruction of property interests or value in the property impacted. *E.g., McCarthy v. City of Manhattan Beach*, 264 P.2d 932 (Cal. 1953), *cert. denied*, 348 U.S. 817 (1954) (a regulation preventing construction of a structure on a California beach upheld); *Town of Indialantic v. McNulty*, 400 So.2d 1227 (Fla. App. Dist. 5 1981), and *McNulty v. Town of Indialantic*, 727 F. Supp. 604 (M.D. Fla. 1989) (an oceanfront setback very similar to the regulation involved in the case at bar upheld). *See also Spiegle v. Borough of Beach Haven*, 218 A.2d 129 (N.J.), *cert. denied*, 385 U.S. 831 (1966).

The same principles have been applied in the consideration of the regulation to flood hazard areas. *Turner v. County of Del Norte*, 101 Cal.Rptr. 93 (Cal. 1972); *Turnpike Realty Co. v. Town of Dedham*, 284 N.E.2d 891 (Mass. 1972); *cert. denied*, 409 U.S. 1108 (1973); *Usdin v. Dep't of Envir. Protection*, 414 A.2d 280 (N.J. 1980), *aff'd*, 430 A.2d 949 (1981); *Maple Leaf Investors, Inc. v. State Dep't of Ecology*, 565 P.2d 1162 (Wash. 1977) (en banc).

Similarly, the right of an owner to build in sensitive wetlands and coastal marshes in ways that harm public interests has been prohibited in numerous states, yet these regulations have been held not to constitute a taking even where the regulatory prohibition results in no structural development of the environmentally sensitive land being feasible. *E.g., Candlestick Properties, Inc. v. San Francisco Bay Conservation & Dev. Comm'n*, 89 Cal.Rptr. 897 (Cal. 1973); *Potomac Sand & Gravel Co. v. Governor of Maryland*, 293 A.2d 241 (Md. 1972), *cert. denied*, 409 U.S. 1040 (1972); *Carter v. South Carolina Coastal Council*, 314 S.E. 2d 327 (S.C. 1984); *Orion Corp. v. State of Washington*, 747 P.2d 1062 (Wash. 1987), *cert. denied*, 486 U.S. 1022 (1988); *Just v. Marinette County*, 201 N.W.2d 761 (Wis. 1972).

Petitioner advances the view, in a mild variation from that advocated by the dissent below, that the "underlying purpose" of the legislation is more concerned with "promoting a public good" than the prevention of public harm.[20] First, the unambiguous language of the legislative findings regarding the necessity of the beach/dune system clearly refute any contention that the Act did not have as at least one of its primary purposes the prevention of a public harm. *See* S.C. Code Ann. § 48-39-250(1)(a), (c); § 48-39-250(2)-(4), (6); § 48-39-260(1)(a), (d).

Petitioner and others[21] advance the argument that "residential construction" can hardly be regarded as a "nuisance" or a "noxious use" of property. Petitioner's Brief on the Merits, pp. 41-45. The argument begs the question. The fact that a traditionally accepted use of property is prohibited does not obviate the application of the *Mugler* rule to insulate the prohibition from a taking claim.[22] It may be true that

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[20] Curiously, but not surprisingly in light of the legislative findings of the Act itself, the dissent below implicitly recognized (by stating that the Act does not have as its "*primary* purpose the prevention of a nuisance.") that at least one purpose of the Act was the prevention of a public harm. *Lucas v. South Carolina Coastal Council*, 404 S.E.2d at 905 (Dissent of Harwell, A.J.).

[21] *See* the dissenting opinion below, *Lucas v. South Carolina Coastal Council*, 404 S.E.2d at 902 and *Amicus Curiae* brief of the United States, p. ___.

[22] Petitioner objects to what it regards as the unjustified conclusion of the South Carolina Supreme Court that he conceded that the use he intended for his two lots was a "nuisance." Petitioner's Brief on the Merits, p. 10. As demonstrated, *supra*, the label one puts on a "use" is not pivotal. What is pivotal is the fact that the "use" is forbidden as a result of the valid exercise of the police power to mitigate or avoid a public harm.

residential building on the shoreline is traditionally regarded as an acceptable use of shoreline property. Of course, all of the uses prohibited by the challenged regulations in *Mugler*, *Hadacheck*, *Reinman*, *Goldblatt*, and *Keystone*, not to mention the panoply of uses involved in the profusion of federal and state decisions upholding zoning regulations prohibiting those uses, were legally acceptable uses of real property prior to the legislative determination that they should be prohibited. Any given use "in particular circumstances and in particular localities" may be declared a nuisance in fact and in law. *Hadacheck v. Sebastian*, 239 U.S. at 411. The South Carolina legislature has found, and Petitioner has not contested, that construction on his lots is, under the particular circumstances – *i.e.*, the uncontested need to preserve the beach/dune system to provide, among other things, protection to people and property – and in the particular locality – *i.e.*, within the area designated as within that system – a use which is harmful to the public. Hence, even if the construction of a residence is regarded in the abstract as an entirely appropriate and innocuous use, that same use in the circumstances and in the location identified by the South Carolina legislature may properly be regarded as a "nuisance." Here, construction in the shoreline area comprising Petitioner's lots is " . . . merely the right thing in the wrong place, – like a pig in a parlor instead of a barnyard." *Euclid v. Ambler Realty Co.*, 272 U.S. at 388.

If legislation declaring a particular use the legal equivalent of a nuisance withstands judicial scrutiny, the public interest is deemed sufficient to uphold the regulation against a taking claim. *Keystone Bituminous Coal Ass'n v. DeBenedictis, supra*, 480 U.S. at 490. The determinative question, then, is whether the Act *can* withstand "judicial scrutiny."

The Act has already been at least reviewed by the South Carolina Supreme Court, and has passed muster. Moreover, it is respectfully suggested that there is no cause for the application of this Court's "scrutiny" where the constitutional validity of the Act was not an issue raised below. A police power regulation enjoys a strong presumption of validity. *E.g.*,

American Federation of Labor v. American Sash & Door Co., 335 U.S. 538 (1949). In the case of *Sproles v. Binford*, 286 U.S. 374 (1932), this Court held that, "(w)hen the subject lies within the police power of the State, debatable questions as to reasonableness are not for the courts but for the legislature, which is entitled to form its own judgment, and its action within its range of discretion cannot be set aside because compliance is burdensome." *Id.*, 286 U.S. at 388-9. Applying this principle, the Fourth Circuit Court of Appeals, while reviewing precisely the same legislation involved here, held that it would be inappropriate to "second guess" the determination of the South Carolina Assembly that the Act substantially advanced an important state interest. *Esposito v. South Carolina Coastal Council*, 939 F.2d 165 (4th Cir. 1991), *petition for cert. filed*, 60 U.S.L.W. 3505 (U.S. Dec. 5, 1991) (No. 91-941). Further, the decision of the South Carolina Supreme Court and the Petitioner's identification of the Question Presented to this Court make it clear that Petitioner has never raised the validity of the statute, *per se*, for review. *See* Rules of the Supreme Court, 24.1(a). The jurisdictional statute, 28 U.S.C. § 1257, indisputably gives this Court the power to review the constitutionality of a state statute, but the rules suggest that it would do so only if the question is raised by the Petitioner or there is plain error in the statute. It stands as a matter of general principle that the Court will not review a question of statutory validity that has not been properly presented. *C.I.O. v. McAdory*, 325 U.S. 472 (1945).

Even if the Act were to be examined anew by this Court to determine whether it "substantially advances legitimate state interests," *e.g.*, *Nollan v. California Coastal Commission*, 483 U.S. 825, 834 and n. 3 (1987), it is clear that, given the record in this case, the allegedly offending regulation would pass the test. The findings of the South Carolina legislature are clear, concise, and uncontradicted by the Petitioner. The record is void of any evidence which would in any way contest the legislative findings regarding the public interests served by the Act, its purposes, and the legitimacy of the means chosen to accomplish those purposes. The South Carolina legislature has found that construction or reconstruction

of other than certain specifically authorized things within a specified distance from the shoreline will interfere with the continued viability of the South Carolina beach/dune system, which in turn the legislature found to be an important natural resource serving, among other natural and essential purposes, to prevent and/or mitigate the undeniable harm occasioned by storms and the sea. In order to prevent the public harm occasioned by the continued destruction of the beach/dune system, the legislature chose to utilize the obvious and most direct means: to eventually eliminate what it found to be the cause of the harm by prohibiting new construction or reconstruction which would threaten the continued viability of the valuable resource.

The national trend since the mid-1970's has been to secure a better understanding of the dynamics of barrier islands, storms and erosion and to apply reasonable setback regulations for those highly hazardous areas. The Flood Disaster Protection Act of 1973 (P.L. 93-234, Section 107) was adopted to include erosion hazards within the risks to be addressed by the federal flood insurance program. The regulations adopted to implement this program have, since 1976, provided that where erosion prone areas are identified, local regulations should "require setbacks for all new development from the ocean to create a safety buffer. The buffer may be used for suitable open space purposes and for other activities using temporary and portable structures only." 44 C.F.R. Part 60.S. Some thirteen coastal states have adopted minimum setbacks for development in high hazard areas along the oceans and Great Lakes.[23] The National Research Council has

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[23] Center for Urban and Regional Studies, University of North Carolina, *Evaluation of the National Coastal Zone Management Program* at 69 (1991). For discussion of the state minimum oceanfront setback requirements of other states, *see, e.g.*, Hildreth, *Coastal Natural Hazards Management*, 59 Oreg. L. Rev. 201 (1980); Maloney and O'Donnell, *Drawing the Line at the Oceanfront*, 30 Fla. L. Rev. 393 (1978); Owens, *Coastal Management in North Carolina: Building a Regional Consensus*, 51 J. Am. Plan. Assoc. 322, 325-27 (1985); Shows, *Florida's Coastal Setback Line – An Effort to Regulate Oceanfront Development*, 4 Coastal Z. Mngt. J. 151 (1978).

recommended that all coastal states adopt minimum oceanfront setbacks even more substantial than the one involved in this case, and that such be a mandated part of the federal flood insurance program.[24] The team of experts who reviewed this area of South Carolina after Hurricane Hugo concluded that "[i]t is crucial that the concept of a gradual, strategic retreat from the ocean remain a part of coastal management at the state level and that the local communities participate in the process by adopting the Local Comprehensive Shorefront Management Plans. These plans are to include the development and adoption of local ordinances to protect sand dunes and provide for setback requirements."[25] In short, South Carolina is not alone in recognizing the need for Shoreline Management regulations which prohibit the construction of, among other things, private residences within the beach/dune system.

Given the true nature and clear applicability of the *Mugler* rule revealed by more than a century of Supreme Court precedent, and given the undeniable weight to be accorded the Act because of the legitimate interest of the State of South Carolina to provide for the continued viability of an important and *protective* natural resource, it is respectfully submitted that the decision of the South Carolina Supreme Court should be affirmed.

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[24] National Research Council, *Managing Coastal Erosion* (1990).

[25] Federal Emergency Management Agency, *Interagency Hazard Mitigation Team Report: Hurricane Hugo* at 18-19 (Report No. 843-DR-SE, October 1989).

II. IF THE COURT CONCLUDES THAT THE *MUGLER* DOCTRINE SHOULD NOT HAVE BEEN APPLIED TO PRECLUDE PETITIONER'S CLAIM, THIS COURT SHOULD FAVORABLY CONSIDER A REMAND FOR FURTHER PROCEEDINGS TO PERMIT THE SOUTH CAROLINA COURTS TO DETERMINE, UTILIZING OTHERWISE APPLICABLE PRECEDENT, WHETHER A REGULATORY TAKING HAS OCCURRED, PARTICULARLY IN LIGHT OF THE 1990 AMENDMENTS TO THE 1988 BEACHFRONT MANAGEMENT ACT.

If this Court is inclined to hold that the South Carolina Supreme Court was in error in its application of *Mugler* and its progeny to deny Petitioner's regulatory taking claim, it is respectfully suggested that this Court favorably consider remanding the matter with instructions in order to permit the South Carolina courts to determine whether, under relevant and time-honored considerations long endorsed by this Court, a regulatory taking did in fact occur.

The decision of the South Carolina Supreme Court is premised on the application of but one legal principle, the "*Mugler* rule." Because it held that principle to be conclusive, the state court did not consider any other factors which have traditionally been deemed of utmost importance in the determination of whether the application of a land use regulation results in a taking requiring compensation under the Takings Clause of the Fifth Amendment.[26] *See Lucas v. South Carolina Coastal Council*, 404 S.E.2d at 896.

For example, the court did not address whether the regulation, in fact, denied Petitioner "all economically viable

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[26] Even though Petitioner concedes that the appropriate tests to be applied to his claim are those enumerated in *Penn Central Transportation Co. v. New York*, 438 U.S. at 124, the tests pronounced in *Agins v. Tiburon*, 447 U.S. 255 (1980) are also referred to herein. The fact remains that regardless of which of the tests are deemed applicable to the claim under consideration, the South Carolina courts did not fully address the questions posed by either in reaching their decisions.

use,"[27] the nature and extent of Petitioner's "investment backed expectations" in the property in question[28] and the reasonableness thereof in light of the regulated nature of the shoreline land question,[29] whether Petitioner had, as a matter of state law, a recognized and protected "property interest" in the construction of any structure permitted by applicable land use regulations prior to the enactment of the Act,[30] and whether, given the 1990 amendments to the Act, there was a "taking" at all, particularly in light of this Court's admonition that "[m]ere fluctuations in value during the process of governmental decision making, absent extraordinary delay, are 'incidents of ownership.'" *Agins v. Tiburon*, 447 U.S. 255, 263, n.8 (1980).

It is clear that should the South Carolina Supreme Court's decision be reversed, the decision of the trial court cannot stand as presently stated. The trial court awarded Petitioner compensation for a "permanent" taking. A finding of a "permanent" taking and an award of compensation,

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[27] *E.g., Nollan v. California Coastal Commission*, 483 U.S. at 834. This question is particularly perplexing and fact oriented where, as here, the use of the property pursued by Petitioner was to hold it as raw land, and hence it was a use which would have produced generated income only if there was an increase in "market value."

[28] *E.g., Penn Central Transportation Co. v. New York*, 438 U.S. at 124.

[29] Where, as is arguable here, the claimant had adequate real or constructive notice of the possibility of value depressing regulations, a fact question arises as to whether and to what extent his investment was reasonable, as opposed to speculative.

[30] *See* Section IV, *infra*. The attorney for Respondent reserved the argument that no taking has occurred as a result of his failure to apply for a permit. Jt. App., pp. 3-4, para. 16.

therefore, without offering the government the option of providing alternative relief is directly contrary to recognized law: "[o]nce a court determines that a taking has occurred, the government retains the whole range of options already available – amendment of the regulation, withdrawal of the invalidated regulation, or exercise of eminent domain." *First English Evangelical Lutheran Church v. County of Los Angeles*, 482 U.S. at 321. Therefore, the matter requires further proceedings of any event.

Further, with the enactment of the 1990 amendments to the Act, particularly provisions providing a means by which a permit may be issued to enable the construction of the residences Petitioner originally intended, it is clearly inappropriate to conclude that there has been a permanent taking of Petitioner's property. It is undisputed that Petitioner has not availed himself of the opportunity to determine whether the South Carolina Coastal Commission would grant him a permit to "use" his property in the manner he claims to have originally intended. Until he does so, it is necessarily impossible to determine whether the " . . . administrative agency has arrived at a final, definitive position regarding how it will apply the regulations at issue to the particular land in question." *Williamson County Regional Planning Comm'n v. Hamilton Bank*, 473 U.S. at 172, 190-1 (1985). At this stage in these proceedings, considering the mandates of *Williamson County Regional Planning Comm'n v. Hamilton Bank*, 473 U.S. 172, 190-1 (1985) and *MacDonald, Sommer and Frates v. County of Yolo*, 477 U.S. 340, 348, *reh'g denied*, 478 U.S. 1035 (1986), the ultimate impact of the Act on the "property rights" of Petitioner cannot be determined until such time as an administrative decision concerning the uses to be permitted is made.

Because this Court does not have the benefit of many of the factual and legal determinations regarded as necessary in considering regulatory taking claims, including whether any "taking" found is "temporary" or "permanent," a remand for consideration of the facts and circumstances pertinent to those factors would be a substantial aid in what this Court has consistently referred to as the " . . . essentially ad hoc, factual

inquiries . . . " necessary to the determination of a regulatory taking claim. *E.g., Keystone Bituminous Coal Ass'n v. DeBenedictis*, 480 U.S. at 495. *See First English Evangelical Lutheran Church v. County of Los Angeles*, 482 U.S. at 321-2 (case remanded to determine whether there had in fact been a taking based on a denial of "all use of . . . property for a considerable period of years").

III. A REGULATION WHICH ELIMINATES THE VALUE OF UNDEVELOPED LAND AT A GIVEN POINT IN TIME DOES NOT ESTABLISH A FIFTH AMENDMENT "TAKING" OF THAT PROPERTY.

This Court has long recognized that it

> . . . has generally "been unable to develop any 'set formula' for determining when 'justice and fairness' require that economic injuries caused by public action be compensated by the government, rather than remain disproportionally concentrated on a few persons. Rather, it has examined the "taking" question by engaging in essentially ad hoc, factual inquiries that have identified several factors – such as the economic impact of the regulation, its interference with reasonable investment backed expectations, and the character of the government action – that have particular significance.

Kaiser Aetna v. United States, 444 U.S. 164, 175 (1981); *Hodel v. Virginia Surface Mining & Reclamation Ass'n, Inc.*, 452 U.S. 264, 294-296 (1981). Petitioner concedes, as he must, that these considerations are applicable to his taking claim.[31] Petitioner nonetheless advances the contention that

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[31] Petitioner's Brief on the Merits, pp. 15-16. Petitioner, nevertheless, implies that the test of "economically viable use" is pertinent here. Even if that test is applied the derivation of the term demonstrates that it should have limited applicability to the broad spectrum of factual circumstances found in "regulatory takings" cases. Making its debut as a

(Continued on following page)

where a land use regulation "eliminat[es] the value of private property [it] should be per se subject to the just compensation requirement of the Fifth Amendment." Pet. Brief on the Merits, p. 19. He, in essence, urges the adoption of the proposition that where the economic interest of the landowner is eliminated, no other considerations this Court has traditionally deemed relevant to a taking inquiry would or could apply to prevent the finding of the constitutional taking. In other words, Petitioner urges that considerations which this Court has long deemed to be relevant to the taking inquiry be deemed irrelevant if one of them, "the economic impact of the regulation," reveals that the regulation has caused the loss of all "market value" of the property involved.

(Continued from previous page)

material consideration in Fifth Amendment regulatory "taking" cases in *Agins v. Tiburon*, 447 U.S. 255, 260 (1980), it is derived from an admission made during oral argument in *Penn Central Transportation Co. v. New York City, supra*. As recited in the *Penn Central* decision, that admission was:

> The city conceded at oral argument that if appellants can demonstrate at some point in the future that circumstances have so changed that the Terminal ceases to be "economically viable," appellants may obtain relief. See Tr. of Oral Arg. 42-43.

Id., 438 U.S. at 138, p. 36. Placed in context, the term clearly applied to property which was being commercially utilized in a manner permitted under state law and utilized in a manner which was "economically viable" at the time of the imposition of the allegedly offending regulation. In other words, counsel for the City of New York admitted that if, in the future, its restrictions on the expansion of the already existing commercial use of the property caused it to "cease" being "economically viable," then Penn Central would be entitled to "relief."

It is respectfully submitted that application of that test to raw, undeveloped land – *i.e.* land which has not established any form of "economic viability" in any literal sense of that term – does nothing more than seek to maintain the land's "market value", an interest in property which in and of itself is not recognized as a constitutionally recognized property right. *See* Section III, *infra*.

Yet this Court has made it clear that, just as a legitimate exercise of the police power may result in a Fifth Amendment taking, *see, e.g., Nollan v. California Coastal Commission, supra*, "a comparison of values before and after a regulatory action is relevant," but such a comparison is " . . . *by no means conclusive*." *Keystone Bituminuous Coal Ass'n v. DeBenedictis*, 480 U.S. at 490 quoting from *Goldblatt v. Hemstead*, 369 U.S. at 594 (emphasis provided). The wisdom of that holding continues, particularly where, as here, the property alleged to have been taken has never been put to a use other than that ordinarily put to vacant land, even when other, more intense uses could have been pursued. Moreover, in making some form of "market value" test conclusive in the determination of a Fifth Amendment taking claim involving the type of land (or property interest) involved in the case now before it, this Court would permit the vicissitudes of the real estate market, undeniably fickle and entrepreneurial, to dictate with exactitude not only the compensation to be paid, but also the decision as to whether a "taking" occurred. That result,[32] we suggest, is inconsistent with established precedent, as previously cited, and is not mandated by the Fifth Amendment.

Further, this Court has also held that a taking does not necessarily occur where regulation impacts on some but not all of the "bundle of rights" which comprise the property in question. *See, e.g., Andrus v. Allard*, 444 U.S. 51, 66 (1979) (the deprivation of but one "strand," the right to convey, of a full "bundle of property rights" does not result in a taking); *Penn Central Transportation Co., supra* (deprivation of air

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[32] That this is particularly unfortunate is demonstrated by this case. With the 1990 amendments, Petitioner has the ability to obtain a permit to use the property in a manner otherwise prohibited by the Act. As a result, it is not a stretch of the imagination or common sense to conclude that Petitioner's lots, purportedly valueless at the time of trial, gained value (as yet unquantified, a fact which should be ascertained, *see* Section II, *supra*) as soon as the 1990 amendments became effective. This would be clearly the case if permits to construct have been issued to other affected landowners in similar circumstances.

rights over property not a taking where remaining rights maintained). Here, the Act prohibits construction (with certain exceptions) on Petitioner's lots. Even if the Court assumes that Petitioner's expectation of being able to construct residences on the property is a recognized property right subject to Fifth Amendment protection, this is but one "strand" in his "bundle of property rights". *See Andrus v. Allard*, 444 U.S. at 66. He has always retained the full panoply of recognized rights considered to be a part of fee simple ownership of raw land: the right to use, to exclude others, to dispose, to pass it on to his heirs, etc.[33]

Lastly, it is noteworthy that the "litmus test" that Petitioner suggests has, after all, been perfectly apparent for more than a century. It is conspicuous only by its absence in "taking" jurisprudence; it has never been adopted as the bright line beyond which a regulation may not tred without actuating the "Takings Clause" of the Fifth Amendment. It is respectfully suggested that there has been no material change in pertinent facts or law, including those applicable to property rights and interests, which might lead to the conclusion that the test Petitioner suggests would be more constitutionally palatable, indeed mandated, now than it might have been in the past.

For these reasons alone, it is respectfully suggested that this Court categorically reject such an unsupported, simplistic and over reaching application of the Taking Clause.

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[33] It is important to note that this is not a situation where loss of "all use" of land has been either assumed or proven. This Court in *First English Evangelical Lutheran Church of Glendale v. County of Los Angeles*, assuming by virtue of the pleadings below that "all use" of the property had been extinguished by the regulation in question, concluded that there would be a taking. Here, it is uncontradicted that Petitioner has retained uses, as well as the full panoply of property rights normally recognized as held by the owner of property.

A. Petitioner never possessed a constitutionally recognized "property right" in any given use of land prohibited by the Act.

Even if the Court is inclined to look favorably on Petitioner's contention, his claim suffers from a basic, and fatal, flaw: Petitioner did not have a protected property interest to construct any structure on his undeveloped land, and therefore has no property interest in the value derived therefrom. As a result, Petitioner has not suffered a compensable taking of private property under the Fifth Amendment.

Petitioner's claim requires the examination of some basic elements of taking law. The Fifth Amendment states, in pertinent part, that "private property [shall not] be taken for public use without just compensation." By virtue of the language itself, it is axiomatic that "private property" is protected against uncompensated taking for public use. Hence, in the consideration of any Fifth Amendment taking claim, the initial determination must be whether what is claimed to have been "taken" is to be deemed "private property" for which compensation may be paid. *E.g., Ruckelshaus v. Monsanto Co.*, 467 U.S. 986, 1000-1 (1983); *Webb's Fabulous Pharmacies, Inc. v. Beckwith*, 449 U.S. 155, 160-1 (1980).

The scope of the term "private property" has been delineated:

> It is conceivable that (the term "property" in the Taking Clause) was used in its vulgar and untechnical sense of the physical thing with respect to which the citizen exercises rights recognized by law. On the other hand, it may have been employed in a more accurate sense to denote the group of rights inhering in the citizen's relation to the physical thing, as the right to possess, use and dispose of it. The construction given the phrase has been the latter.

United States v. General Motors Corp., 323 U.S. 373, 377-378 (1945). Yet, while this Court has defined the scope of the term, it is a "basic axiom that [p]roperty interests are not created by the Constitution. Rather, they are created and their dimensions are defined by existing rules and understandings

that stem from an independent source such as state law." *Ruckelshaus v. Monsanto Co.*, 467 U.S. 1001, *quoting Webb's Fabulous Pharmacies, Inc. v. Beckwith*, 449 U.S. at 161 (internal quotation omitted). *See Board of Regents v. Roth*, 408 U.S. 564, 577 (1972). However, " . . . a mere unilateral expectation or an abstract need is not a property interest entitled to protection." *Webb's Fabulous Pharmacies, Inc. v. Beckwith*, 449 U.S. at 161.

Applying these principles, this Court has concluded that a variety of property interests fall within the broad definition of "property" as used in the Taking Clause. *E.g., Hodel v. Irving*, 481 U.S. 704 (1987) (right to pass on property to heirs); *Armstrong v. United States*, 364 U.S. 40 (1960) (materialmen liens). Conversely, it has also concluded that certain interests are not "property" for Fifth Amendment purposes. *E.g., Bowen v. Gilliard*, 483 U.S. 587 (1987) (continuation of support payments under AFDC); *United States v. Chandler-Dunbar Water Power Co.*, 229 U.S. 53 (1913) (no protectable interest in navigable waters).

The question thus becomes whether Petitioner has a "property interest" recognized by the Taking Clause in the uses prohibited by the Act. Simply stated, the Act as applied prohibited any (with some exceptions) "construction" on his lots. The question is therefore further refined to whether Petitioner possessed a "property right" in the ability to construct anything on his lot.[34]

There is no vested interest in the mere anticipation of a right to build. Where a permit to build is required, any prospective right to the permit prior to its issuance "is not in

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[34] Petitioner's property prior to the enactment of the Act was subject to zoning which permitted residential uses. (Transcript, p. 27). In order to engage in that use, Petitioner was required to obtain permits from the local government. (Transcript, pp. 39-40). Petitioner did not gain any form of permit to construct anything on his lots. (Transcript, pp. 39-40). With the application of the Act, Petitioner was prohibited from any construction, with some exceptions. Hence, the appropriate question is whether the application of the Act was a taking of any vested interest Petitioner may have had in the ability to construct anything on his property.

the nature of interests the deprivation of which is encompassed by the Fifth Amendment 'takings' doctrine." *Scott v. Greenville County*, 716 F.2d 1409, 1421 (4th Cir. 1983). See, *e.g., DeStefano v. City of Charleston*, 403 S.E.2d 648, 651 (S.C. 1991).

Whether a given plaintiff has a vested property right is a matter to be determined by reference to state law. *Mays-Ott Co., Inc. v. Town of Nags Head*, 751 F. Supp. 82, 84 (E.D.N.C. 1990), *citing Bd. of Regents v. Roth*, 408 U.S. 564, 578 (1972). It is evident in this context that the state of South Carolina does not recognize the concept of a vested right in a putative right to develop property absent the issuance of a permit *and* substantial expenditures in reliance thereon. *E.g., Friarsgate, Inc. v. Town of Irmo*, 290 S.C. 266, 269, 349 S.E.2d 891, 893 (S.C. Ct. App. 1986) (a zoning change that prevented development prior to substantial expenditures by the developer did not infringe upon vested rights even though the change came after issuance of the permit); *Whitfield v. Seabrook*, 259 S.C. 66, 190 S.E.2d 743 (1972) (issuance of a permit to build without subsequent expenditures did not create a vested right to be protected from subsequent zoning changes).

In the case at bar, Petitioner never obtained a permit to build. He actually never even sought one from the governmental authority. (Transcript, pp. 39-40). Under South Carolina law, therefore, he never acquired a right to construct on his lots. Consequently, the Act did not prohibit a "property right" *held by Petitioner*.

B. Petitioner had no constitutionally protected "economic interest" in any uses prohibited by the Act.

While recognizing that "economic interests" may be regarded as property subject to Fifth Amendment protection, this Court has been clear in delineating the test to determine whether an "economic interest" is to be so regarded. As held in *United States v. Willow River Power Co.*, 324 U.S. 499 (1945),

> . . . [N]ot all economic interests are "property rights"; only those economic advantages are rights

> which have the law back of them, and only when they are so recognized may courts compel others to forbear from interfering with them or to compensate for their invasion.

Id., 324 U.S. at 502. In considering the landowner's claim in that case, the Court described the process by which it was to determine whether an "economic interest" is to be considered a "property right:"

> We cannot start the process of decision by calling such a claim as we have here a "property right": whether it is a property right is really a question to be answered. Such economic uses are rights only when they are legally protected interests.

Id., 324 U.S. at 502-3.

Willow River does not stand alone. In *Kaiser Aetna v. United States, supra*, this Court considered whether Kaiser Aetna had an economic interest in a navigable pond which it created on land which was regarded as private property under state law. Quoting and applying the test enunciated in *Willow River*, the Court found that because Kaiser had improved the pond to its navigable state, and had done so on property regarded as private property under Hawaii state law, the economic interest in being able to charge for the use of the pond was protected from the United States' claim that the pond was a "navigable waterway" not subject to private control. *Id.*, 444 U.S. at 178-9.

Applying these concepts to the case at hand, it is clear that Petitioner has no protectable "economic interest" in the uses prohibited by the Act. The record reveals that the value ascribed to the property was tied inexorably to construction on the lots.[35] Yet, as demonstrated above, Petitioner has no

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[35] The testimony below was that the property was rendered valueless by virtue of the application of the Act. (Transcript, pp. 40-59). The Act prohibited any new construction on Petitioner's lots. *A priori*, if Petitioner's evidence is to be believed, the lots only have value if something (other than what the Act permitted) could be constructed on it.

constitutionally protected right in any given construction on these lots, and therefore has no right in the "value" resulting therefrom.

CONCLUSION

For all of the reasons stated herein, the American Planning Association and Tahoe Regional Planning Agency, as Amici Curiae, respectfully suggest that the decision of the South Carolina Supreme Court be affirmed or, in the alternative, be vacated and remanded for the purposes suggested herein.

Respectfully submitted,

H. Bissell Carey, III
Robinson & Cole
One Commercial Plaza
Hartford, Connecticut 06103
(203) 275-8200

Counsel of Record for Amici Curiae
American Planning Association
and Tahoe Regional Planning Agency

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